

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LEE AMBROSE,

No. 3:12-cv-01740-HU

Plaintiff,

**OPINION AND
ORDER**

v.

J.B. HUNT TRANSPORT, INC., a
foreign corporation

Defendant.

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1 HUBEL, Magistrate Judge:

2 This case arises out of an employment dispute between
3 Plaintiff Lee Ambrose ("Plaintiff") and his former employer,
4 Defendant J.B. Hunt Transport, Inc. ("Defendant"). Defendant now
5 moves, pursuant to Federal Rule of Civil Procedure ("Rule") 56(c),
6 for summary judgment on Plaintiff's exclusively state law claims
7 for violation of the Oregon Family Leave Act ("OFLA"), disability
8 discrimination, failure to engage in interactive process, and
9 workers' compensation discrimination. For the reasons that follow,
10 Defendant's motion (Docket No. 32) for summary judgment is granted
11 in part and denied in part.

12 I. FACTS AND PROCEDURAL HISTORY

13 Sometime in 2005, Plaintiff was driving a commercial truck for
14 Vic West Steel, when he began to experience an accelerated heart
15 rate, excessive sweating and nausea ("the 2005 incident").
16 Plaintiff received a clean bill of health after being examined by
17 a cardiologist and his own physician. In early to mid-2006,
18 Plaintiff had a similar episode while driving, where he experienced
19 an accelerated heart rate, excessive sweating and shortness of
20 breath ("the 2006 incident"). Plaintiff's dispatcher once again
21 told him to consult with a doctor to determine the root cause of
22 these episodes. Plaintiff did so and ultimately underwent a
23 catheter ablation in May of 2006.¹

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25
26 ¹ As Defendant's counsel explained during oral argument, "a
27 catheter ablation is where . . . a catheter is inserted in the
28 groin, goes up through the artery, into the heart, and then the
surgeon . . . kills a part of the heart muscle in order to
eliminate [an arrhythmia issue] that a person may have." (Mot.
Summ. J. Hr'g Tr. 3, Nov. 19, 2013.)

1 Plaintiff was hired by Defendant effective May 2, 2011, to
2 work as a commercial truck driver. Defendant requires its drivers
3 to comply with applicable Department of Transportation ("DOT")
4 regulations. Possessing a valid DOT medical certificate is a
5 prerequisite to being employed as one of Defendant's drivers.
6 Defendant's policies state that obtaining a DOT medical certificate
7 under false pretenses would be grounds for automatic termination.
8 (Kreider Decl. ¶ 11; Ohman Back Decl. Ex. B at 15.)
9 "[F]alsification of an application or any work, personnel, or other
10 J.B. Hunt records" would also be grounds for automatic termination.
11 (Kreider Decl. ¶ 11; Ohman Back Decl. Ex. B at 15.)

12 Plaintiff understood that his position was contingent upon
13 successfully passing a DOT examination and possessing a valid DOT
14 medical certificate. As part of the hiring process, Plaintiff
15 completed and signed a "Medical Examination Report For Commercial
16 Driver Fitness Determination." (Ohman Back Decl. Ex. B at 2.)
17 Under the health history section, Plaintiff answered: (1) "no" to
18 having "any illness or injury in the last 5 years," (2) "no" to
19 prior "cardiovascular conditions," (3) "no" prior "heart surgery"
20 or any "surgery," and (4) "no" prior "loss of or altered
21 consciousness" or "fainting, dizziness."² (Ohman Back Decl. Ex. B
22 at 2.) Plaintiff certified that he provided complete and accurate
23 information, and he acknowledged that "inaccurate, *false*, or
24 *missing* information may invalidate the [DOT] examination and [his]
25 Medical Examiner's Certificate." (Ohman Back Decl. Ex. B at 2)
26 (emphasis added).

27
28 ² The Court notes that only the first question on the Medical
Examination Report was limited to a five-year time period.

1 Plaintiff claims that he verbally informed Operations
2 Supervisor, Mario Nucci ("Nucci"), and the DOT medical examiner,
3 Stephanie Toman ("Toman"), M.D., about the 2005 incident, the 2006
4 incident and his May 2006 catheter ablation procedure. (Ambrose
5 Dep. 54:19-55:6, 122:1-123:16, Jan. 25, 2013.) Plaintiff does not
6 dispute, however, that he provided false information on the medical
7 history form used by the DOT to evaluate his fitness to work as a
8 commercial truck driver. (Ambrose Dep. 51:6-15, 52:1-9, 67:16-21.)
9 Nor can Plaintiff dispute whether pertinent information regarding
10 his medical history was missing from the Medical Examination
11 Report.

12 On December 29, 2011, Plaintiff began to suffer from cold
13 symptoms while driving a semi-truck for Defendant from Portland,
14 Oregon, to Weed, California, and back. After arriving in Weed at
15 approximately 4:45 p.m. on December 29, 2011 (Ambrose Tr. 4:10-25,
16 Dec. 30, 2011), Plaintiff took a dose of DayQuil to treat his chest
17 cold symptoms (Ambrose Dep. 142:3-14). Plaintiff went to bed
18 around 8:00 p.m. that evening. (Ambrose Tr. 17:21-25.) Plaintiff
19 took another dose of DayQuil at approximately 3:00 a.m. on December
20 30, 2011 (Ambrose Tr. 17:5-10; Ambrose Dep. 142:16-17), and
21 departed for Portland about six minutes later (Ambrose Tr. 3:22-
22 4:1).

23 At approximately 6:00 a.m., thirty miles north of Grants Pass,
24 Oregon, Plaintiff began to cough incessantly after extinguishing a
25 cigarette and blacked out behind the wheel. (Ambrose Tr. 10:1-
26 11:24; Ambrose Dep. 150:13-151:5.) The semi-truck careened across
27 the median and several oncoming traffic lanes, through a guardrail,
28 overturned on an embankment, and eventually came to rest underneath

1 an overpass after narrowly missing the concrete support column.
2 (Burgess Decl. Ex. 6 at 2; Ambrose Dep. 151:6-20, 152:11-153:7.)
3 When Plaintiff regained consciousness, he was hanging upside down
4 by his seat belt and needed assistance from a good Samaritan to get
5 out of the cab. (Ambrose Dep. 151:22-152:1, 154:3-4.)
6 Miraculously, no other vehicles were involved in the accident.
7 (Ambrose Dep. 153:21-25; Burgess Decl. Ex. 6 at 3.)

8 Plaintiff immediately reported the accident to his direct
9 supervisor, Account Manager Brad Kreider ("Kreider"), and then went
10 by ambulance to the Three Rivers Community Hospital in Grants Pass,
11 where he received treatment for a chest contusion (bruised chest)
12 and fainting episode (syncope). The treatment notes prepared by
13 the emergency room doctor, Douglas Howard ("Howard"), M.D., on the
14 morning of the accident state:

15 The patient appears uninjured other than some seat belt
16 tenderness. It is not clear why he had a syncopal
17 episode. I do not believe that simple coughing should
18 cause syncope. *My query would be recurrence of his*
19 *dysrhythmia.* He has remained stable here. His plan is to
20 return to Salem. *I have advised him absolutely no*
driving until he is further cleared by Cardiology. He
declines offer of analgesia, [so] all we will give is
Tylenol and/or Ibuprofen for discomfort. He will follow
up with Cardiology and his own physician when he returns
to Salem.

21 (Ohman Back Decl. Ex. B at 22) (emphasis added).

22 Plaintiff was sitting on an emergency room bed when he was
23 approached by Defendant's casualty investigator, David LaLande
24 ("LaLande"). (Burgess Decl. Ex. 6 at 1-2.) Defendant had asked
25 LaLande to obtain photographs of the accident scene and a recorded
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1 statement from Plaintiff.³ (Burgess Decl. Ex. 6 at 1.) Plaintiff
2 consented to have his statement tape-recorded by LaLande and
3 certified that "the statements [he] made [we]re true to the best of
4 [his] knowledge." (Ambrose Tr. 20:22-21:1.) During the interview
5 with LaLande, Plaintiff discussed his medical history, including a
6 number of heart-related issues, in great detail. Also of note is
7 that Plaintiff corrected himself after initially stating he had
8 taken NyQuil, as opposed to DayQuil, at 3:00 a.m. that morning.⁴
9 (Ambrose Tr. 17:5-10.)

10 While at the hospital, an unnamed representative of Defendant
11 asked LaLande to transport Plaintiff "to Asante Occupational Health
12 Clinic for a blood test once he was discharged from the hospital."
13 (Burgess Decl. Ex. 6 at 2.) LaLande escorted Plaintiff to the
14 clinic at approximately 12:29 p.m. (Burgess Decl. Ex. 6 at 2, Ex.
15 9 at 1) and then returned to the scene of the accident, roughly
16 thirty miles north of Grants Pass, to photograph the interior of
17 the cab and look for any contraband, medications or alcohol
18 (Burgess Decl. Ex. 6 at 2, Ex. 9 at 1). At 12:36 p.m., while at
19 the clinic, Plaintiff notified Defendant's safety department that
20 he needed to be cleared by a cardiologist before he could operate
21

22 ³ LaLande received the assignment from Defendant at 6:30 a.m.
23 (Burgess Decl. Ex. 6 at 1.) When he arrived at the accident scene,
24 however, Plaintiff had already been transported to the hospital and
25 LaLande was unable to obtain the necessary photographs due to low-
light conditions and the fact that the semi-truck needed to be
pulled upright. (Burgess Decl. Ex. 6 at 1.)

26 ⁴ Dr. Howard's emergency room record appears to be the only
27 other place where a pre-termination reference to NyQuil can be
28 found. (Ohman Back Decl. Ex. B at 21.) And the record does not
indicate that Plaintiff made such a statement to one of Defendant's
employees prior to being terminated.

1 a vehicle. (Burgess Decl. Ex. 9 at 1.) At 1:03 p.m., Plaintiff
2 notified Defendant's safety department that he completed the blood
3 test. (Burgess Decl. Ex. 9 at 1.) At 1:29 p.m., LaLande completed
4 his review and photographs of the accident scene.⁵ (Burgess Decl.
5 Ex. 9 at 1.)

6 That same day, presumably around the same time, Kreider began
7 filling out a Safety Event Review. The true and correct copy of
8 the three-page Safety Event Review is attached as Exhibit E to
9 defense counsel's declaration. (Ohman Back Decl. ¶ 6.) When
10 Kreider was deposed on May 7, 2013, he initially claimed that the
11 entire Safety Event Review was drafted during a telephonic meeting
12 held on January 4, 2012, even though the review date is listed as
13 December 30, 2011. (Kreider Dep. 22:1-11, 34:12-35:3, May 7,
14 2013.) After taking a nine-minute break, Kreider asked to correct
15 himself and proceeded to explain that he initiated the Safety Event
16 Review on the day of the accident by typing in "the alpha code" and
17 that "it was a collision," but he "didn't actually input any of the
18 facts and information in there until . . . the [telephonic meeting
19 on January 4, 2012]." (Kreider Dep. 41:15-22, 42:15-24.) On
20 September 2, 2013, Kreider submitted a declaration to the Court
21 indicating that he prepared the Safety Event Review "at or near the
22 time of [the] Safety Event Review Meeting." (Kreider Decl. ¶ 7.)
23 Kreider's testimony on this matter should be evaluated by a jury.

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26 ⁵ The Court notes that the safety department records from the
27 day of the accident reference that LaLande (the adjuster or ADJ)
28 "called in," but the only callers that appear to be listed are
Plaintiff (the driver or "V1") and Kreider (the account manager or
"A/M"). (Burgess Decl. Ex. 9 at 1.)

1 Under the section entitled "Conclusion of Review," the Safety
2 Event Review states, among other things: (1) the safety department
3 "is setting up a drug screen," (2) the "root cause" of the accident
4 was improper rest and improper recognition of illness, (3)
5 Plaintiff should "[a]llways report illness to management and never
6 operate a truck with inadequate rest, breaks, or proper health,"
7 and (4) "[a]ny future safety events could lead to disciplinary
8 actions up to and including termination of employment." (Ohman
9 Back Decl. Ex. E at 1.) The second page of the Safety Event
10 Review, however, indicates that Plaintiff had been terminated and
11 that Kreider's electronic signature was affixed on January 4, 2012.
12 (Ohman Back Decl. Ex. E at 2.)

13 In the afternoon or evening of December 30, LaLande submitted
14 his investigative report to Defendant. The report is addressed to
15 Defendant and dated December 30, 2011, the specified "loss date."
16 (Burgess Decl. Ex. 6 at 1.) The report clearly states that LaLande
17 enclosed a copy of Plaintiff's recorded statement (detailing his
18 medical history and mistaken reference to NyQuil), a self-described
19 "complete summary" of Plaintiff's statement, and the Oregon State
20 Police Crash report. (Burgess Decl. Ex. 6 at 1-2.)

21 Four days later, on January 3, 2012, Kreider called Plaintiff
22 to let him know that a Safety Event Review would be conducted.
23 (Ambrose Dep. 202:17-203:4.) Plaintiff informed Kreider that he
24 would not be able to attend in person since he was not cleared to
25 operate a vehicle. (Ambrose Dep. 203:6-9; see also Kreider Decl.
26 ¶ 7.)

27 Plaintiff attended a telephonic Safety Event Review on January
28 4, 2012, before Kreider, Area Risk Manager Keith Phillips

1 ("Phillips"), and General Manager of Delivery Services Mike
2 Nicholson ("Nicholson") (collectively, "the safety review team").
3 (Nicholson Decl. ¶ 2; Phillips Decl. ¶ 2; Kreider Decl. ¶ 7.)
4 During that teleconference, Kreider prepared a portion of the
5 "Conclusion of Review" section based on Plaintiff's description of
6 the accident and the Oregon State Police Crash Report. (Kreider
7 Decl. ¶ 8; Kreider Dep. 22:1-11, 42:16-24.) When Plaintiff
8 mentioned that he had taken DayQuil, Kreider asked for and received
9 a picture message of the bottle because he "wanted to make sure
10 that what [Plaintiff] was saying was accurate, that he was
11 [actually] taking DayQuil" (Kreider 24:12-22), as opposed to, for
12 example, NyQuil (Kreider Dep. 24:23-25:1).

13 By this time, Kreider and Nicholson both knew that "the
14 physicians at the hospital wanted [Plaintiff] to be checked out
15 again before he could drive." (Nicholson Decl. ¶ 2; Kreider Decl.
16 ¶ 7.) Nevertheless, the safety review team apparently all agreed
17 that improper rest and improper recognition of illness was the root
18 cause of the accident (Kreider Decl. ¶ 7; Phillips Decl. ¶ 2), and
19 that the accident was therefore preventable (Kreider Decl. ¶ 7;
20 Phillips Decl. ¶ 2; Nicholson Decl. ¶ 3). Later that day, a Driver
21 Status Change was prepared indicating that Plaintiff had been
22 terminated for violating DOT regulations.⁶ (Burgess Decl. Ex. 7 at
23 4-5.)

26 ⁶ See 49 C.F.R. § 392.3 (prohibiting drivers from operating
27 commercial motor vehicles "while the driver's ability or alertness
28 is so impaired, or so likely to become impaired, through fatigue,
illness, or any other cause, as to make it unsafe for him/her to
begin or continue to operate the commercial motor vehicle.")

1 Prior to being informed of his termination, Plaintiff claims
2 that he "orally requested that he be returned to work upon his
3 doctor's release, and that if possible he be employed in some other
4 work in the interim." (Second Am. Compl. ¶ 15; Ambrose Decl. ¶
5 10.) On January 5, 2012, Plaintiff called Kreider to report an
6 upcoming appointment with a cardiologist and was told that he had
7 been fired. (Ambrose Dep. 215:1-22.) Sometime in April of 2012,
8 Plaintiff was diagnosed with a heart condition necessitating a
9 pacemaker. It was not until about the third week of April 2012
10 that Plaintiff was able to return to work as a commercial truck
11 driver. Plaintiff continued to suffer from severe heart-related
12 problems and had a stent implanted on May 16, 2012.

13 In early September 2012, Plaintiff commenced the present
14 action against Defendant in Multnomah County Circuit Court,
15 alleging state law claims for violation of the OFLA, disability
16 discrimination, failure to engage in interactive process and
17 wrongful discharge, along with a federal claim for violation of the
18 Family and Medical Leave Act ("FMLA"). On September 26, 2012,
19 Defendant removed the action to federal court on the basis of
20 diversity and federal question jurisdiction. 28 U.S.C. §§ 1331,
21 1332. Following the grant of an unopposed motion for leave
22 pursuant to Rule 15(a)(2), Plaintiff filed an amended complaint on
23 October 18, 2012, alleging only state law claims for violation of
24 OFLA, disability discrimination, failure to engage in interactive
25 process, and workers' compensation discrimination.

26 II. LEGAL STANDARD

27 Summary judgment is appropriate "if pleadings, the discovery
28 and disclosure materials on file, and any affidavits show that

1 there is no genuine issue as to any material fact and that the
2 movant is entitled to judgment as a matter of law." FED. R. CIV.
3 P. 56(c). Summary judgment is not proper if factual issues exist
4 for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
5 1995).

6 The moving party has the burden of establishing the absence of
7 a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
8 U.S. 317, 323 (1986). If the moving party shows the absence of a
9 genuine issue of material fact, the nonmoving party must go beyond
10 the pleadings and identify facts which show a genuine issue for
11 trial. *Id.* at 324. A nonmoving party cannot defeat summary
12 judgment by relying on the allegations in the complaint, or with
13 unsupported conjecture or conclusory statements. *Hernandez v.*
14 *Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus,
15 summary judgment should be entered against "a party who fails to
16 make a showing sufficient to establish the existence of an element
17 essential to that party's case, and on which that party will bear
18 the burden of proof at trial." *Celotex*, 477 U.S. at 322.

19 At the outset, it must be noted that, for purposes of the
20 pending motion only, Defendant "relies upon Plaintiff's allegations
21 and admissions to demonstrate that, even if true, no genuine issue
22 of material fact exists to defeat summary judgment on all claims."
23 (Def.'s Mem. Supp. at 2.) "Credibility determinations, the
24 weighing of the evidence, and the drawing of legitimate inferences
25 from the facts are jury functions, not those of a judge at summary
26 judgment." *Barnett v. PA Consulting Group, Inc.*, 715 F.3d 354, 358
27 (D.C. Cir. 2013) (citation omitted).

1 The court must view the evidence in the light most favorable
2 to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d
3 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the
4 existence of a genuine issue of fact should be resolved against the
5 moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).
6 Where different ultimate inferences may be drawn, summary judgment
7 is inappropriate. *Sankovick v. Life Ins. Co. of N. Am.*, 638 F.2d
8 136, 140 (9th Cir. 1981). However, deference to the nonmoving
9 party has limits. The nonmoving party must set forth "specific
10 facts showing a genuine issue for trial." FED. R. CIV. P. 56(e).
11 The "mere existence of a scintilla of evidence in support of
12 plaintiff's positions [is] insufficient." *Anderson v. Liberty*
13 *Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the
14 record taken as a whole could not lead a rational trier of fact to
15 find for the nonmoving party, there is no genuine issue for trial."
16 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.
17 574, 587 (1986) (internal quotation marks omitted).

18 III. EVIDENTIARY RULINGS

19 A. Motion One

20 At page eight of its memorandum in support, Defendant notes
21 that its safety review team felt that "the December 30, 2011
22 *potentially deadly*, rollover accident was preventable." (Def.'s
23 Mem. Supp. at 8) (emphasis added). Plaintiff moves to strike the
24 emphasized language on the ground that it is irrelevant under
25 Federal Rule of Evidence ("FRE") 401.

26 While the Court is mindful of the fact that "[d]efects in
27 evidence submitted in opposition to a motion for summary judgment
28 are waived absent a motion to strike or other objection," *FDIC v.*

1 *N.H. Ins. Co.*, 953 F.2d 478, 484 (9th Cir. 1991) (citing *Scharf v.*
2 *U.S. Att’y Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979)), not all
3 “objections are necessary, or even useful, given the nature of
4 summary judgment motions in general,” *Burch v. Regents of the Univ.*
5 *of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Indeed,
6 “objecti[ng] to evidence on the ground that it is irrelevant . . .
7 [is] duplicative of the summary judgment standard itself.” *Id.*
8 Courts “can award summary judgment only when there is no genuine
9 dispute of *material* fact.” *Id.*

10 The Court is capable of determining which facts are relevant
11 to Defendant’s motion for summary judgment and disregarding
12 extraneous or improper factual statements. The adjectives
13 Defendant chooses to use in describing the accident in this case
14 are not facts, but are properly treated as argument. No part of
15 the Court’s decision on this motion is based on the language
16 objected to and therefore the motion is denied as moot.

17 **B. Motion Two**

18 At page fourteen and fifteen of its memorandum in support,
19 Defendant states: “*In a transparent attempt* to avoid the
20 consequences of [Defendant’s] after-acquired evidence and create a
21 material issue of fact, Plaintiff subsequently testified he told
22 his . . . supervisor, Mario Nucci, and the [DOT] Medical Examiner
23 that he had a catheter ablation in 2006 on or about April 27,
24 2011.” (Def.’s Mem. Supp. at 14-15) (emphasis added). Here,
25 Defendant is alluding to its assertion that, prior to being hired,
26 Plaintiff made material misrepresentations to Defendant and the DOT
27 medical examiner about his past medical history. Plaintiff moves
28

1 to strike the emphasized language on the ground it is
2 "inappropriate" and irrelevant under FRE 401.

3 The Court denies Plaintiff's motion to strike Defendant's
4 counsel's use of the language "[i]n a transparent attempt," because
5 it is not a factual statement. It is permissible legal argument,
6 although not helpful.

7 **C. Motion Three**

8 At page three of its memorandum in support, Defendant
9 references that "*Plaintiff never advised . . . the DOT medical*
10 *examiner, or J.B. Hunt, that he had lost consciousness while*
11 *driving before he was hired or before the December 30, 2011*
12 *accident—and, in fact, now denies he ever lost consciousness*
13 *before this accident despite his unambiguous admissions to the*
14 *contrary.*" (Def.'s Mem. Supp. at 3.) Plaintiff moves to strike
15 the emphasized language on the grounds that it is inaccurate and
16 that Defendant lacks personal knowledge of that which it declares.

17 Whether Defendant's statement in its argument is correct or
18 not that Plaintiff has provided inconsistent reports and testimony
19 on the subject of whether he had lost consciousness while driving
20 prior to December 30, 2011, is not a basis to strike the argument.
21 The motion is denied.

22 **D. Motion Four**

23 At page four of its memorandum in support, Defendant states
24 that:

25 Plaintiff also reported his health history on the [DOT]
26 Medical Examination Report. Again Plaintiff answered
27 'no' to having 'any illness or injury in the last 5
28 years,' 'no' prior 'heart surgery' or any 'surgery,' and
'no' prior 'loss of or altered consciousness' or
'fainting, dizziness.' Plaintiff certified that he
provided 'complete and true' information. He

1 acknowledged that 'inaccurate, false, or missing
2 information may invalidate the examination and [his DOT]
3 Medical Examiner's Certificate.' *Plaintiff denied all*
4 *other prior medical history to the DOT medical examiner.*

5 (Def.'s Mem. Supp. at 4) (internal citations omitted) (emphasis
6 added). Plaintiff moves to strike the emphasized language on the
7 ground that the DOT medical examiner, Toman, "does not have any
8 recollection concerning Plaintiff's DOT medical examination [and
9 thus] cannot give testimony concerning matters about which she has
10 no personal knowledge." (Pl.'s Resp. at 7-8.)

11 Again, this is defense counsel's argument of what the record
12 evidence means. It is not an effort by counsel to "supplement" the
13 record. Therefore, the motion is denied.

14 Of interest, having denied the motion, the Court notes that
15 Toman concedes that she cannot specifically recall Plaintiff or his
16 examination. (Toman Dep. 27:18-28:7, July 15, 2013.) Toman did,
17 however, provide the following testimony regarding the notes she
18 transcribed on Plaintiff's report during his examination:

19 Q. Okay. And what do your notes say [on Plaintiff's DOT
20 Medical Examination Report]?

21 A. It looks like a little bit of, maybe, the date there
22 is cut off, but I read (quoted): '18/2011, {left} heel
23 injury - followed by podiatrist - no limitations,' and
24 denies any other past medical history. Denies
25 hospitalization. No medications.

26 Q. Okay. Does it say anything about a catheter ablation
27 [Plaintiff underwent in May 2006]?

28 A. No.

Q. If he had told you that he'd had a catheter ablation,
is that something you would have written down?

A. Yes.

Q. Now, Mr. Ambrose has testified that he told you he had
a catheter ablation but had no subsequent issues, and

1 [that] you stated (quoted as read): 'All right. Then
2 don't worry about it.' Do you recall any such
conversation?

3 A. No.

4 Q. If you had that discussion, is that something you
5 would have made note of?

6 A. Absolutely.

7 Q. And why is that?

8 A. Because that's significant past medical history for
someone that is going to be driving [semi-trucks].

9 Q. Would you have made a note of it anywhere else in his
10 records, or would it have been under this section [on the
medical examination report entitled 'Medical Examiner's
11 Comments on Health History']

12 A. It would have been under that . . . section . . . and
13 sometimes, if I ran out of room [in that section], I
would have to write down the side [on the same page of
the report].

14 (Toman Dep. 13:12-14:18.)

15 This is the record before the Court.

16 **E. Motion Five**

17 At page eight of its memorandum in support, Defendant states:
18 "At the time of his December 30, 2011 accident, *Plaintiff did not*
19 *know he had a medical condition*, which he subsequently believed
20 caused the incident." (Def.'s Mem. Supp. at 8.) Plaintiff moves
21 to strike the emphasized language on the ground that it is
22 inaccurate. As Plaintiff goes on to explain, the passage of his
23 deposition testimony cited by Defendant does not support this
24 assertion because Plaintiff "testified he had been informed he had
25 a heart attack by the ER physician." (Pl.'s Resp. at 8.)

26 Pure common sense and simple logic demonstrates Plaintiff's
27 motion to strike lacks merit. Plaintiff did not visit the
28 emergency room until after his December 30, 2011 accident.

1 Defendant prefaced its statement regarding Plaintiff being unaware
2 of a medical condition by stating "[a]t the time of his December
3 30, 2011 accident." If Plaintiff received information regarding a
4 potential medical condition after the accident occurred,
5 Defendant's counsel's statement is accurate. Plaintiff's counsel
6 ignores Plaintiff's testimony that he "had a medical condition
7 unknown to [him] at the time that caused [the December 30, 2011]
8 accident." (Ambrose Dep. 245:21-22.) Motion denied.

9 **F. Motion Six**

10 At page eight of its memorandum in support, Defendant states:

11 At the time of his termination [on January 5, 2012],
12 Plaintiff had not been released to drive by a physician.

13 While disputed, Plaintiff alleges that Mr. Kreider
14 advised him that J.B. Hunt did not have any work for him,
15 but once he was cleared to drive to let them know 'to see
16 if . . . we could get reviewed and possibly rehired.'
17 *Plaintiff could not perform the essential functions of*
the driving position, with or without reasonable
accommodation. Plaintiff, however, was not aware of any
open, light duty (non-driving) positions at J.B. Hunt at
the time of his termination.

18 (Def.'s Mem. Supp. at 8) (emphasis added). Plaintiff moves to
19 strike the emphasized language on the ground that it is an
20 "[i]nappropriate legal conclusion unsupported by the cited
21 material." (Pl.'s Resp. at 8.)

22 Once again, Defendant's counsel is presenting an argument
23 about whether the record raises a material issue of fact. Whether
24 the record raises a question about Plaintiff's ability to perform
25 the essential functions of the commercial truck driver position is
26 addressed below in evaluating Plaintiff's disability discrimination
27 claim. Motion denied.

28 ///

1 **G. Motion Seven**

2 At page thirteen of its memorandum in support, Defendant
3 states: "In sum, Plaintiff did not disclose (1) *the 1999 syncope*;
4 (2) the 2006 catheter ablation . . . ; and (3) the 2009 syncope
5 while driving to either J.B. Hunt or the DOT Medical Examiner prior
6 to his employment." (Def.'s Mem. Supp. at 13) (emphasis added).
7 Plaintiff moves to strike the emphasized language on the ground
8 that "Defendant has offered no expert testimony as foundation for
9 the assertion that any prior incident was a 'syncope.'" (Pl.'s
10 Resp. at 8.)

11 Whether Defendant correctly characterizes the 1999 event (or
12 any other alleged syncopal event, for that matter) moved against,
13 or not, is not a question the Court must resolve on this summary
14 judgment motion. As with many of the motions to strike, this is
15 argument of counsel not factual evidence. Therefore the motion to
16 strike is denied.

17 **IV. DISCUSSION**

18 **A. OFLA Interference**

19 Defendant argues that it is entitled to summary judgment on
20 Plaintiff's OFLA interference claim on two grounds. First,
21 Defendant contends that "Plaintiff could not have returned to work
22 within twelve weeks after the incident and, therefore, OFLA would
23 not protect Plaintiff as a matter of law." (Def.'s Mem. Supp. at
24 16.) Second, Defendant contends that "Plaintiff never qualified
25 for OFLA because, prior to his termination, he did not establish
26 that he suffered from a 'serious health condition.'" (Def.'s Mem.
27 Supp. at 16.)
28

1 To the extent possible, OFLA is to be construed in a manner
2 that is consistent with any similar provisions of the FMLA. OR.
3 REV. STAT. § 659A.186(2). "Consistent with this legislative
4 declared intent, the Oregon courts have looked to federal law when
5 interpreting OFLA." *Sanders v. City of Newport*, 657 F.3d 772, 783
6 (9th Cir. 2011). "FMLA and OFLA allow eligible employees to take
7 twelve workweeks of leave per year to care for their own or a
8 family member's serious health condition," *Lawson v. Walgreen Co.*,
9 No. CV. 07-1884-AC, 2009 WL 742680, at *5 (D. Or. Mar. 20, 2009),
10 and "[e]mployers are not allowed to deny or in any way interfere
11 with an employee's right to take leave under either FMLA or OFLA,"
12 *id.*

13 Under his first cause of action, Plaintiff alleges that
14 "Defendant interfered with his OFLA rights by terminating him
15 before he was able to exercise such rights, and discharged [him]
16 because he took medical leave." (Second Am. Compl. ¶ 18.)
17 Plaintiff's first cause of action, as plead, is appropriately
18 considered an interference claim. See 29 U.S.C. § 2615(a)(1).
19 Indeed, as the Ninth Circuit explained in *Bachelder v. American*
20 *West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001): "By their plain
21 meaning, the anti-retaliation or anti-discrimination provisions do
22 not cover visiting negative consequences on an employee simply
23 because he has used FMLA leave. Such action is, instead, covered
24 under § 2615(a)(1), the provision governing '[i]nterference [with
25 the] [e]xercise of rights.'" *Id.* at 1124 (citations omitted);
26 *Hall-Hood v. Target Corp.*, No. 2:12-cv-01458-APG, 2013 WL 3030477,
27 at *3 (D. Nev. June 14, 2013) (citing *Bachelder* for the same
28 proposition).

1 Defendant's memorandum in support and Plaintiff's opposition
2 brief correctly address Plaintiff's first cause of action as an
3 interference claim brought pursuant to § 2615(a)(1). At page eight
4 of its reply brief, however, Defendant characterized Plaintiff's
5 allegation that Defendant "discharged [him] because he took medical
6 leave" as a retaliation claim brought pursuant to § 2615(a)(2). See
7 *Sanders*, 657 F.3d at 777 ("An allegation of a violation of [§
8 2615(a)(2)] is known as a 'discrimination' or 'retaliation'
9 claim.") That is incorrect.

10 Some circuits have invoked § 2615(a)(2) in cases where the
11 employee "was subjected to an adverse employment action for taking
12 FMLA protected leave." *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133
13 n.7 (9th Cir. 2003). The Ninth Circuit, however, has "clearly
14 determined that § 2615(a)(2) applies only to employees who *oppose*
15 employer practices made unlawful by FMLA, whereas, § 2615(a)(1)
16 applies to employees who simply take FMLA leave and as a
17 consequence are subjected to unlawful actions by the employer."
18 *Id.*; see also *Flores v. Merced Irrigation Dist.*, 758 F. Supp. 2d
19 986, 996 (E.D. Cal. 2010) (discharge constitutes an unlawful or
20 adverse employment action under the FMLA).

21 Clarifying the appropriate characterization of Plaintiff's
22 first cause of action is critical for two reasons. The first is
23 that the Ninth Circuit does not apply the burden-shifting framework
24 delineated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792
25 (1973), to interference claims. *Sanders*, 657 F.3d at 778. Instead,
26 an employee can prove an interference "claim, as one might any
27 ordinary statutory claim, by using either direct or circumstantial
28 evidence, or both." *Bachelder*, 259 F.3d at 1125. The second is

1 that "the employer's intent is irrelevant to a determination of
2 liability" in an interference case. *Sanders*, 657 F.3d at 778.
3 Therefore, in evaluating the motion against the OFLA interference
4 claim, the Court will not consider the motive of Defendant nor
5 apply the *McDonnell Douglas* burden-shifting framework.

6 Because Oregon applies case law interpreting FMLA to OFLA
7 claims, the discussion below is of FMLA case law. The elements of
8 a prima facie OFLA interference claim are: (1) the employee was
9 eligible for OFLA's protections, (2) the employer was covered by
10 the OFLA, (3) the employee was entitled to leave under the OFLA,
11 (4) the employee provided sufficient notice of her intent to take
12 leave, and (5) the employer denied the employee OFLA benefits to
13 which she was entitled. See *Perez-Denison v. Kaiser Found. Health*
14 *Plan of the Nw.*, 868 F. Supp. 2d 1065, 1080 (D. Or. 2012); see also
15 *Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006).

16 The Court begins by addressing Plaintiff's claim that
17 "Defendant admits [that] it failed to inform [him] of the
18 availability of OFLA leave." (Pl.'s Resp. at 13.) "[T]he employer
19 is responsible, having been notified of the reason for an
20 employee's absence [or having been notified that leave is needed],
21 for being aware that the absence may qualify for FMLA protection."
22 *Bachelder*, 259 F.3d at 1131; 29 C.F.R. § 825.302(c) (employees only
23 need to "state that leave is needed.") Once such notice is given,
24 "[i]t is the employer's responsibility to determine when FMLA [or
25 in this case OFLA] leave is appropriate, to inquire as to specific
26 facts to make that determination, and to inform the employee of his
27 or her entitlements." *Amway Corp.*, 347 F.3d at 1134.

1 The record does suggest that Defendant received notice that a
2 potential FMLA-qualifying absence was forthcoming. Specifically,
3 on December 30, 2011, at 12:36 p.m., Defendant's safety department
4 received a call from Plaintiff, indicating that he had to see a
5 cardiologist before the emergency room doctor would clear him to
6 drive. (Burgess Decl. Ex. 9 at 1.) That call to the safety
7 department raises a material issue of fact as to whether Defendant
8 was on notice that Plaintiff was in need of FMLA/ OFLA leave. Cf.
9 *Cooper v. Gulfcoast Jewish Family Servs., Inc.*, No.
10 8:09-cv-787-T-30TBM, 2010 WL 2136505, at *7 (M.D. Fla. May 27,
11 2010) (denying motion for summary judgment on employee's
12 interference claim because an "e-mail from [the employee] stating
13 that her physician had referred her for further treatment and
14 additional information would be forthcoming, create[d] a material
15 disputed fact as to whether [the employer] was on notice that
16 Plaintiff was requesting additional FMLA leave.")

17 The problem for Plaintiff is that "an actionable
18 'interference' in violation of § 2615(a)' exists [only] when the
19 plaintiff 'is able to show prejudice as a result of that
20 violation.'" *Stewart v. Sears, Roebuck & Co.*, No. CV-04-428-HU,
21 2005 WL 545359, at *11 (D. Or. Mar. 7, 2005) (citation omitted).
22 Guided by that principle, judges from this district have disposed
23 of interference claims at the summary judgment stage when, for
24 example, the employee indisputably could not return to work within
25 twelve weeks of being discharged. See *Santrizos v. Evergreen Fed.*
26 *Sav. & Loan Ass'n*, Civ. No. 06-886-PA, 2007 WL 3544211, at *5-6 (D.
27 Or. Nov. 14, 2007) (employee suffered no harm since he could not
28 return to work within twelve weeks of the effective termination

1 date); *Nelson v. Unified Grocers, Inc.*, No. 3:10-cv-00531-PK, 2012
2 WL 113742, at *1 (D. Or. Jan. 12, 2012) (Mosman, J.) (reversing
3 recommendation to deny summary judgment on § 2615(a)(1) claims,
4 stating, among other things, that "even assuming [the] discharge
5 was retaliatory, there is no material dispute that [the employee]
6 was unable to work for at least several months post-discharge.")

7 *Santrizos* and *Nelson* are consistent with the understanding
8 that the right to reinstatement "is the linchpin of the
9 [interference] theory [since] 'the FMLA does not provide leave for
10 leave's sake, but instead provides leave with an expectation that
11 an employee will return to work after the leave ends.'" *Sanders*,
12 657 F.3d at 778 (quoting *Edgar v. JAC Prods., Inc.*, 443 F.3d 501,
13 507 (6th Cir. 2006)). They are also consistent with the
14 understanding that § 2615(a)(1) "is not a strict liability
15 statute." *Grimes v. Fox & Hound Rest. Group*, No. 12-CV-1229-JAR,
16 2013 WL 6179292, at *10 (D. Kan. Nov. 25, 2013); see also
17 *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 979-80
18 (8th Cir. 2005) ("Logic also dictates we interpret the FMLA to
19 preclude the imposition of strict liability whenever an employer
20 interferes with an employee's right to take FMLA leave"); *Edgar*,
21 443 F.3d at 508 ("By the same token, the FMLA is not a
22 strict-liability statute.")

23 Without giving due consideration to the declared legislative
24 intent of the OFLA and the Oregon appellate court decisions that
25 have looked to federal law when interpreting the OFLA, see, e.g.,
26 *Yeager v. Providence Health Sys. Or.*, 195 Or. App. 134, 140 (2004),
27 Plaintiff attempts to avoid the *Santrizos* line of cases by arguing
28 that "they are federal cases interpreting FMLA rather than OFLA and

1 thus are not controlling precedent." (Pl.'s Resp. at 13.) The
2 Court is not persuaded by this argument and will look to federal
3 law when interpreting the OFLA.

4 The Court is similarly unpersuaded by Plaintiff's argument
5 that, "under Defendant's handbook, [he] was entitled to six weeks
6 of personal leave, placing [his] release date (the third week in
7 April) within the time permitted for [statutory] leave." (Pl.'s
8 Resp. at 14.) Plaintiff cites no authority in support of this
9 aggregation theory, and in the Court's view, such a theory has no
10 place in the interference context.

11 Employers are not liable under an interference theory if they
12 "discharge a person who fails to return to work at the expiration
13 of the twelve week period, even if [the employee] cannot return to
14 work for medical reasons." *Kleinmark v. St. Catherine's Care Ctr.*,
15 585 F. Supp. 2d 961, 963 (N.D. Ohio 2008). That is so regardless
16 of whether the medical evidence revealing the employee's inability
17 to return to work was discovered post-discharge, *Edgar*, 443 F.3d at
18 513, or even pertained to the same physical or mental condition
19 "that forced the employee to take a medical leave in the first
20 place," *id.* at 516, and regardless of whether the employee's
21 ability to return twelve weeks after being discharged was due to a
22 condition exacerbated by the decision to terminate, *Santrizos*, 2007
23 WL 3544211, at *7-8. The case law simply does not suggest, as
24 Plaintiff posits, that employees can use personal leave to extend
25 the twelve-week statutory leave period in order to revive an
26 expired right to reinstatement and impose liability on their
27 employer under the FMLA. Were that not the case, the twelve-week
28 statutory leave period would become a sword, rather than a shield.

Defendant terminated Plaintiff's employment effective January 5, 2012. During his deposition, Plaintiff testified that he was not cleared to "drive a truck" until "about the third week of April" 2012, which would have been between 100 and 107 days after he was discharged. (Ambrose Dep. 243:19-244:9; 254:8-12.) Plaintiff has also made the following statement: "I was unable to work driving a vehicle until I had a pacemaker implanted and a right coronary st[em] [implanted on May 16, 2012]." (Ambrose Decl. ¶ 7; Ambrose Dep. 279:8-24; Pl.'s Resp. at 17.) Clearly Plaintiff was not capable of resuming his duties as a commercial truck driver within the FMLA-leave period of eighty-four days. See generally *Edgar*, 443 F.3d at 512 ("[T]he court is charged with resolving the objective question of whether the employee was capable of resuming his or her duties within the FMLA-leave period.") Defendant is therefore entitled to summary judgment on Plaintiff's interference claim.

B. Disability Discrimination

Defendant argues that it is entitled to summary judgment on Plaintiff's disability discrimination claim because Plaintiff has failed to show that: (1) he was a "qualified individual" with a disability; (2) he suffered an adverse employment action because of his disability; and (3) Defendant's legitimate, nondiscriminatory reason for terminating his employment was mere pretext for disability discrimination.⁷

⁷ Under his second cause of action, Plaintiff alleges that Defendant violated Oregon's disability discrimination statute, ORS 659A.112, when it "terminated [him] in substantial part either because of [his heart condition], or in the alternative, because Defendant perceived Plaintiff as being disabled." (Second Am.

Oregon's disability discrimination statute "makes it an unlawful employment practice for an employer to refuse to hire or promote, to bar or discharge from employment, or to discriminate in the terms, conditions, or privileges of employment on the basis of an otherwise qualified person's disability." *Mayo v. PCC Structural, Inc.*, No. 3:12-CV-00145-KI, 2013 WL 3333055, at *3 (D. Or. July 1, 2013) (citing ORS 659A.112(1)). The statute specifies that an employer discriminates by, *inter alia*, not making "reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability who is a[n] . . . employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employee." OR. REV. STAT. § 659A.112(2)(e).

1. The Prima Facie Case

Consistent with the legislative declared intent, ORS 659A.112 is to be construed to the extent possible in a manner that is consistent with any similar provisions in the Americans with Disabilities Act of 1990 ("ADA"). See OR. REV. STAT. § 659A.139. In order to establish a prima facie case of disability discrimination under the ADA, "a plaintiff must show that he: (1) is a disabled or perceived as such; (2) is a qualified individual, meaning he is capable of performing the essential functions of the job; and (3)

Compl. ¶ 23.) Plaintiff also alleges that Defendant discriminated against him in violation of ORS 659A.112 by failing to "attempt to accommodate [his] known disability." (Second Am. Compl. ¶¶ 15, 20.)

suffered an adverse employment action because of his disability."⁸
Shepard v. City of Portland, 829 F. Supp. 2d 940, 963 (D. Or. 2011); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001) ("The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law.")

a. Prong One: Disability

The first prong requires the plaintiff to demonstrate that he is disabled within the meaning of the ADA. The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). As should be clear from that definition, to establish a "regarded as" claim under the ADA, "the plaintiff must present evidence that the defendant [perceived him] as having a physical or mental impairment

⁸ Plaintiff's second cause of action is entitled "disability/perceived disability discrimination," yet he presents arguments in support of claims for retaliation and simple failure to accommodate. In addition to failing to plead such claims, Plaintiff fails to recognize that they are distinct causes of action. See *Carvajal v. Pride Indus., Inc.*, No. 10-cv-2319-GPC, 2013 WL 1728273, at *6 (S.D. Cal. Apr. 22, 2013) (discrimination distinct from a cause of action for retaliation under the ADA); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139 (9th Cir. 2001) ("Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability.") The Court declines to consider any simple failure to accommodate claim or retaliation claim at this stage in the proceedings. See *Wasco Prods. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings"); *Speer v. Rand McNally & Co.*, 123 F.3d 658, 665 (7th Cir. 1997) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.")

1 that substantially limits a major life activity." *Echols v. Lokan*
 2 & Assocs., Inc., No. CV-06-293-ST, 2007 WL 756691, at *10 (D. Or.
 3 Mar. 7, 2007); see also *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d
 4 1083, 1089 (8th Cir. 2000) ("To establish a 'regarded as' claim
 5 under the ADA, [plaintiff] must show that [defendant] perceived him
 6 as actually disabled.")

7 Plaintiff proceeds under alternative theories with respect to
 8 the first prong of the prima facie case, namely that he is disabled
 9 "by virtue of his heart condition," or alternatively, that
 10 "Defendant perceived [him] as being disabled" based on the December
 11 30, 2011 accident.⁹ (Second Am. Compl. ¶¶ 21-23.) Although
 12 Defendant disputes whether it had any knowledge or perception that
 13 Plaintiff was disabled, "for the purposes of this motion only,
 14 [Defendant] assumes Plaintiff may have had an actual disability at
 15 the time of his January 5, 2012 termination." (Def.'s Mem. Supp.
 16 at 21.) Because the ADA defines disability in the disjunctive,
 17 Defendant's concession is sufficient to create a genuine issue of
 18 material fact as to the first prong of Plaintiff's prima facie case
 19 of discrimination. See *Walsh v. Bank of Am.*, 320 F. App'x 131,
 20 132-33 (3d Cir. 2009) ("Because the ADA lists the three
 21 subcategories in the disjunctive, a plaintiff must only show that
 22 he is disabled under one of the three subparts to establish the
 23 first element of a prima facie disability discrimination case.")

24
 25 ⁹ That Court notes that, in order prove a record of disability
 26 under § 12102(1)(B) of the ADA, the documentary record must
 27 indicate that the plaintiff is "actually disabled" under §
 28 12102(1)(A); that is, he has an impairment that substantially
 limits one or more of his major life activities. *Miller v. Winco*
Holdings, Inc., No. CV 04-476-S-MHW, 2006 WL 1471263, at *6 n.4 (D.
 Idaho May 22, 2006).

1 **b. Prong Two: Qualified Individual**

2 In addition to showing that he is disabled under ADA,
3 Plaintiff must also show that he is a "qualified individual." See
4 *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996)
5 (plaintiff bears burden of demonstrating that he is a qualified
6 individual). A "qualified individual" is an "individual with a
7 disability who, with or without reasonable accommodation, can
8 perform the essential functions of the employment position." 42
9 U.S.C. § 12111(8). Despite Plaintiff's suggestion to the contrary,
10 summary judgment is appropriate if no reasonable trier of fact
11 could conclude that he is a "qualified individual." *Kaplan v. City*
12 *of N. Las Vegas*, 323 F.3d 1226, 1230 n.4 (9th Cir. 2003); see also
13 *Kellogg*, 233 F.3d at 1086 (failure to establish any element of a
14 prima facie ADA case warrants summary judgment).

15 Determining whether Plaintiff is a "qualified individual"
16 requires the Court to consider whether Plaintiff was able to
17 perform the essential functions of the commercial truck driver
18 position at the time of his termination *without* accommodation, and
19 then, if he cannot, whether he was able to do so *with* reasonable
20 accommodation. See *Dark v. Curry County*, 451 F.3d 1078, 1086 (9th
21 Cir. 2006), cert. denied, 549 U.S. 1205 (2007); see also *Kaplan*,
22 323 F.3d at 1231. If Plaintiff cannot perform the commercial
23 truck driver position's essential functions even with a reasonable
24 accommodation, then the ADA's employment protections do not apply.
25 *Cripe v. City of San Jose*, 261 F.3d 877, 884-85 (9th Cir. 2001).

26 The Court first addresses whether Plaintiff could perform the
27 essential job functions of the commercial truck driver position
28 *without* accommodation. Plaintiff argues that he is a "qualified

1 individual" because he "performed the essential functions of a
2 driver, i.e., driving truck, before and after the accident." (Pl.'s
3 Resp. at 19.) Plaintiff's argument misses the mark. The question
4 is whether Plaintiff could operate a vehicle at the time of his
5 termination. An illustrative example is the Ninth Circuit's
6 decision in *Curry County*.

7 In *Curry County*, the plaintiff did not dispute whether the
8 operation of heavy machinery was an essential function of the
9 position, choosing instead to dispute whether he was qualified to
10 perform such function. *Curry County*, 451 F.3d at 1087. The Ninth
11 Circuit concluded that there was no genuine issue of fact with
12 respect to the plaintiff's qualifications *without* reasonable
13 accommodation, stating:

14 Had [plaintiff]'s treating physicians opined that [he]
15 was fit to operate heavy machinery at the time of his
16 firing, this perhaps would have given rise to a genuine
17 issue of material fact as to his qualifications *without*
18 *reasonable accommodation*. But the physicians actually
19 recommended [plaintiff]'s return to work following a
period of observation during which he could adjust to the
change in his medication. [Plaintiff] provides no
evidence that his seizures were under control at the time
of his termination.

20 *Id.* (internal citation omitted).

21 Because the undisputed facts in the record in this case
22 indicate that Plaintiff was not cleared to operate a vehicle at
23 time of his January 5 termination, no reasonable juror could
24 conclude that he was able to perform the essential functions of the
25 commercial truck driver position *without* accommodation. That
26 conclusion flows logically from Plaintiff's own statements and from
27 evidence presented by Defendant on what would appear to be an
28 otherwise obvious and undisputed fact (namely, the essential

1 functions of the commercial truck driving position). *See generally*
2 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 991 (9th Cir.
3 2007) (“[A]n employer who disputes the plaintiff’s claim that he
4 can perform the essential functions must put forth evidence
5 establishing those functions.”)

6 The next issue is whether Plaintiff was able to perform the
7 essential functions of the position *with* reasonable accommodation.
8 The Ninth Circuit’s decision in *Kaplan* demonstrates that Defendant
9 is entitled to summary judgment to the extent Plaintiff proceeds on
10 a theory that Defendant regarded him as disabled. In *Kaplan*, there
11 was no issue of fact as to whether the employee could perform the
12 essential job functions without accommodation, as is the case here.
13 *Kaplan*, 323 F.3d at 1230-31. The Ninth Circuit held that there is
14 no duty to accommodate an employee in an “as regarded” case. *Id.*
15 at 1233. To the extent Plaintiff is bringing a “regarded as” case,
16 the Court grants Defendant’s motion for summary judgment in
17 accordance with *Kaplan*. The disability discrimination claim rises
18 or falls on the actual disability theory.

19 The remaining question, then, is whether, under a theory of
20 actual disability, Plaintiff was able to perform the essential
21 functions of the position *with* reasonable accommodation. Generally
22 speaking, “[w]here an employee suffers from an actual disability
23 (i.e., an impairment that substantially limits a major life
24 activity), the employer cannot terminate the employee on account of
25 the disability without first making reasonable accommodations that
26 would enable the employee to continue performing the essential
27 functions of his job.” *Weber v. Strippit, Inc.*, 186 F.3d 907, 916
28 (8th Cir. 1999). The ADA’s definition of discrimination includes

1 "not making reasonable accommodations to the known physical or
2 mental limitations of an otherwise qualified individual with a
3 disability . . . unless such covered entity can demonstrate that
4 the accommodation would impose an undue hardship on the operation
5 of the business." 42 U.S.C. § 12112(b)(5)(A).

6 Plaintiff bears the burden of demonstrating that he could
7 perform the essential functions of the position *with* reasonable
8 accommodation. See *Kennedy, Inc.*, 90 F.3d at 1481. Reasonable
9 accommodations may include, for example, reassignment to a vacant
10 position or an allowance of time for medical care or treatment.
11 *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1109-10 (10th Cir. 1999).
12 But reasonableness is not a constant; rather, "what is reasonable
13 in a particular situation may not be reasonable in a different
14 situation—even if the situational differences are relatively
15 slight." *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048
16 (9th Cir. 1999). That is why courts "must evaluate [a plaintiff's]
17 requests in light of the totality of h[is] circumstances." *Id.*;
18 see also *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th
19 Cir. 1999) (assessing reasonableness of proposed accommodation
20 "requires a fact-specific, individualized inquiry.")

21 When viewed in the light most favorable to him, the record
22 indicates that Plaintiff requested accommodation through either (1)
23 reassignment to a vacant position or (2) an allowance of time
24 (e.g., time created by the use of medical leave, unpaid leave, an
25 aggregation of leave, or an extension of an existing leave period)
26 for medical care or treatment.

27 Indeed, with respect to the first accommodation, Plaintiff
28 alleges that he requested to "be employed in some other work in the

1 interim." (Second Am. Compl. ¶ 15.) Plaintiff also claims that,
2 prior to being terminated, he requested reasonable accommodation of
3 "modified duties." (Ambrose Decl. ¶ 10.) Plaintiff's declaration
4 together with his deposition testimony makes clear that he sought
5 an available position that would not conflict with his driving
6 restrictions. (Ambrose Dep. 219:19-23; Second Am. Compl. ¶ 14.) In
7 other words, Plaintiff requested accommodation through reassignment
8 to a vacant position.

9 With respect to the second accommodation, Plaintiff alleges
10 that Defendant refused his request to "be returned to work upon his
11 doctor's release." (Second Am. Compl. ¶ 15.) Plaintiff also
12 claims that, prior to being terminated, he informed Defendant the
13 he "needed to see a cardiologist regarding possible heart
14 conditions before being cleared to drive" and "requested [the]
15 reasonable accommodation of time off of work." (Ambrose Decl. ¶¶
16 9-10.) Because Plaintiff claims that he didn't "know [exactly]
17 what was wrong with [him]" or "what [his] medical condition was" at
18 the time of his termination (Ambrose Dep. 246:9-23, 247:25-248:3),
19 the Court construes Plaintiff's request for "time off work," or to
20 "be returned to work upon his doctor's release," as a request for
21 an allowance of time for medical care or treatment.

22 With respect to Plaintiff's request to be reassigned, an
23 employee is a qualified individual under the ADA if he can "perform
24 the essential functions of a reassignment position, with or without
25 reasonable accommodation, even if [he] cannot perform the essential
26 functions of the current position." *Hutton v. Elf Atochem N. Am.,*
27 *Inc.*, 273 F.3d 884, 892 (9th Cir. 2001); see also 42 U.S.C. §
28 12111(9) (noting that reasonable accommodation may include

1 reassignment to a vacant position). In order "[t]o survive summary
2 judgment, Plaintiff must establish that he was qualified to perform
3 an appropriate vacant job which he must specifically identify and
4 show was available within the company at or about the time he
5 requested reassignment." *Taylor*, 196 F.3d at 1110.

6 Plaintiff identifies no such vacant jobs within Defendant's
7 company. Plaintiff presents no evidence whatsoever demonstrating
8 that appropriate vacant positions were available or would have
9 become available within a reasonable time period. (Ambrose Dep.
10 276:7-14) ("[A]t or about the time you asked, do you have any facts
11 that would lead you to believe that there were such openings at
12 that time for light-duty positions? A. I don't know enough about
13 this company to make a comment. So -- Q. Okay. A. -- no.") The
14 sole record for the Court to consider is Plaintiff's statement that
15 he was not "offer[ed] any light duty work" and Kreider's statement
16 that "[Defendant] did not have any vacant and suitable positions
17 for which [Plaintiff] was qualified at any time after the December
18 30, 2011 accident." (Kreider Decl. ¶ 10; Pl's Opp'n at 24.)
19 Accordingly, there simply is no genuine issue of fact as to whether
20 Plaintiff could have been accommodated through reassignment.

21 Plaintiff also argues that his impairment ultimately proved to
22 be remediable and Defendant failed to reasonably accommodate him by
23 refusing to provide an allowance of time for medical care and
24 treatment. "An allowance of time for medical care or treatment may
25 constitute a reasonable accommodation." *Taylor*, 196 F.3d at 1110
26 (citation omitted). But "[a]n indefinite unpaid leave is not a
27 reasonable accommodation where the plaintiff fails to present
28 evidence of the expected duration of her impairment." *Id.*; see

1 also *Wynes v. Kaiser Permanente Hosps.*, 936 F. Supp. 2d 1171, 1184
2 (E.D. Cal. 2013) ("[R]easonable accommodation is . . . that which
3 presently, or in the immediate future, enables the employee to
4 perform the essential functions of the [position] in
5 question. . . . [R]easonable accommodation does not require [an
6 employer] to wait indefinitely for [the employee's] medical
7 conditions to be corrected." (quoting *Myers v. Hose*, 50 F.3d 278,
8 283 (4th Cir. 1995))).

9 In *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th
10 Cir. 1996), for example, the employee's duties required her to
11 spend approximately six hours per day on the phone and at the
12 keyboard. *Id.* at 1168. About fourteen months after being hired on
13 January 6, 1993, the employee complained to her supervisor that she
14 was experiencing pain in her hands and arms. *Id.* Over the course
15 of the next three months, the employee was diagnosed with carpal
16 tunnel syndrome; her treating physician issued restrictions
17 providing that she was to take fifteen minutes off for each hour of
18 repetitive, digital activity; the physician issued new restrictions
19 on April 13, 1994, prohibiting typing and keyboard activity,
20 thereby necessitating the performance of other tasks; and lastly,
21 she was terminated on May 24, 1994. *Id.* Two months post-
22 termination, in July of 1994, the employee underwent nerve
23 decompression surgery, and she was ultimately released from her
24 physician's care with no specific work restrictions in October of
25 1994 (e.g., between 130 and 160 days after being discharged). See
26 *id.*

27 On appeal, the employee in *Hudson* challenged the district
28 court's conclusion, at the summary judgment stage, "that she failed

1 to create a genuine issue of material fact concerning her status as
2 a qualified individual under the ADA." *Id.* Because the employee
3 conceded that she was unable to perform the essential functions of
4 the position without accommodation, the *Hudson* court focused on the
5 second part of the qualified individual analysis, namely "whether
6 any reasonable accommodation by the employer would enable h[er] to
7 perform [the essential] functions." *Id.* (citation omitted). The
8 employee emphasized that "her impairment was clearly remediable and
9 that [the employer] failed to reasonably accommodate her by
10 refusing to provide unpaid leave while she sought necessary
11 treatment." *Id.* at 1169. The Tenth Circuit rejected her argument
12 and affirmed the judgment of the district court, stating:

13 [A] reasonable allowance of time for medical care and
14 treatment may, in appropriate circumstances, constitute
15 a reasonable accommodation. In this case, however,
16 plaintiff has failed to present any evidence of the
17 expected duration of her impairment as of the date of her
18 termination. The physicians' reports upon which
19 plaintiff relies indicate only that permanent impairment
20 was not anticipated at the time the reports were
21 prepared. The forms provide no indication, however, of
22 when plaintiff could expect to resume her regular duties
23 at [the company]. Moreover, [plaintiff's doctor]'s notes
24 through the date of her termination underscore the
uncertainty of her prognosis. Under these circumstances,
it makes no difference that [defendant] had the option of
removing her from the payroll and paying the cost of her
disability benefits. [Defendant] was not required to
wait indefinitely for her recovery, whether it maintained
her on its payroll or elected to pay the cost of her
disability benefits. Accordingly, [plaintiff] has failed
to present evidence from which a reasonable jury could
find that the accommodation she urges, unpaid leave of
indefinite duration, was reasonable.

25 *Id.*; see also *Larson v. United Natural Foods W. Inc.*, 518 F. App'x
26 589, 591 (9th Cir. 2013) ("for a requested accommodation to be
27 reasonable, the plaintiff must present evidence of the impairment's
28

1 expected duration, and not the duration of the leave request"
2 (citing *Hudson*, 87 F.3d at 1169).

3 As the Tenth Circuit explained in *Cisneros v. Wilson*, 226 F.3d
4 1113 (10th Cir. 2000), *overruled on other grounds*, *Board of*
5 *Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001),
6 they have distinguished *Hudson* and a found a request for leave to
7 seek medical treatment constituted a reasonable accommodation,
8 where the employee "submitted evidence from his doctor [indicating]
9 that the expected duration of his treatment was four months and his
10 prognosis for recovery was 'good.'" *Id.* at 1130 (citation
11 omitted).

12 The Eleventh Circuit's decision in *Wood v. Green*, 323 F.3d
13 1309 (11th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), is
14 similarly illustrative. In that case, the jury returned a verdict
15 in favor of the employee on his ADA discrimination claim after an
16 eight-day trial. *Id.* at 1311-12. Shortly thereafter, the district
17 court denied the employer's renewed motion for judgement as a
18 matter of law—which required the court to view the evidence in the
19 light most favorable to the employee—finding that the employee's
20 requested accommodation for a leave of absence was not indefinite
21 since he had demonstrated an ability to return to work within "a
22 month or two" of experiencing cluster headaches. *Id.* at 1312.

23 On appeal, the Eleventh Circuit reversed the district court's
24 order denying the employer's motion for judgment as a matter of
25 law—applying the same standards as the district court—stating:

26 While a leave of absence might be a reasonable
27 accommodation in some cases, [plaintiff] was requesting
28 an indefinite leave of absence. [Plaintiff] might return
to work within a month or two, or he could be stricken
with another cluster headache soon after his return and

1 require another indefinite leave of absence. [Plaintiff]
2 was not requesting an accommodation that allowed him to
3 continue work in the present, but rather, in the
4 future—at some indefinite time. . . . [Our prior case
law demonstrates] that an accommodation is unreasonable
if it does not allow someone to perform his or her job
duties in the present or in the immediate future.

5 *Id.* at 1314 (internal citations omitted). The Eleventh Circuit did
6 acknowledge, however, that a prior decision had “parenthetically
7 noted that more compelling facts might lead to a different result.”
8 *Id.* That decision provided the following hypothetical example:
9 “[T]he ADA might be violated ‘if an employee was terminated
10 immediately upon becoming disabled without a chance to use his
11 leave to recover.’” *Id.* (citation omitted).

12 Plaintiff was terminated six days after reporting a possible
13 heart condition, arguably before he had a reasonable chance to
14 determine if he was able to be cleared to drive by a cardiologist
15 with or without further treatment. This is materially different
16 from the situation in *Hudson* where the plaintiff had been allowed
17 months to determine what the medical issue was, what limitations
18 were imposed by the doctor, and what treatment was suggested, but
19 nonetheless was not able to present the employer with information
20 by the time of termination about how long it would be before she
21 could perform the essential functions with the accommodation of
22 leave to seek medical treatment.

23 Likewise, this is distinguishable from the situation in *Wood*
24 where the plaintiff had been given extensive leave over the course
25 of many years to treat the medical condition. It is not clear that
26 no reasonable juror could find on the facts of the present case
27 that the employer was moving forward as fast as possible to a
28 termination decision before the employee could obtain a medical

1 evaluation of what his condition was and how soon he could perform
2 the essential functions of his position if given the reasonable
3 accommodation of leave for medical treatment. Thus, the "more
4 compelling facts" dicta referenced in *Wood* are presented by this
5 case. Accordingly, there is a genuine issue of fact as to whether
6 Plaintiff could have been accommodated through an allowance of time
7 for medical care and treatment.

8 **c. Prong Three: Causation**

9 The third and final prong of a prima facie case requires
10 Plaintiff to show that he suffered an adverse employment action
11 because of his disability. The parties do not dispute whether
12 Plaintiff's termination would be considered an adverse employment
13 action, but they do dispute whether an adverse action was taken
14 because of Plaintiff's disability. "In Oregon, '[e]vidence that
15 permits an inference of discrimination' is sufficient for a
16 plaintiff to make a prima facie case that she was discriminated
17 against because of her disability." *Snead*, 237 F.3d at 1089
18 (quoting *Henderson v. Jantzen, Inc.*, 79 Or. App. 654, 657 (1986));
19 see also *Head v. Glacier Nw. Inc.*, 413 F.3d 1053, 1065 (9th Cir.
20 2005) ("[T]he ADA outlaws adverse employment decisions motivated,
21 even in part, by animus based on a plaintiff's disability or
22 request for an accommodation—a motivating factor standard.")

23 Plaintiff has met his burden of proffering evidence which
24 permits an inference of discrimination. Defendant's only argument
25 to the contrary is based on Plaintiff's testimony that neither he,
26 nor Defendant, had any knowledge regarding "what was wrong with
27 [him]" at the time of his termination. (Ambrose Dep. 246:9-247:1.)
28 Plaintiff's testimony does not foreclose the possibility that

1 Defendant knew about Plaintiff's disability. At the very minimum,
2 the record suggests that: (1) Plaintiff was involved in an accident
3 on December 30, 2011; (2) the casualty investigator contacted
4 Defendant after he interviewed Plaintiff at the hospital and
5 elicited information related to Plaintiff's history of heart-
6 related issues; (3) Defendant was informed that Plaintiff could not
7 drive until he was cleared by a cardiologist; and (4) Defendant
8 terminated Plaintiff's employment six days later. The timing of
9 these events, coupled with the information that was received,
10 permits an inference of discrimination. That is sufficient to
11 raise a genuine issue of fact as to the third and final element of
12 Plaintiff's prima facie case of disability discrimination.

13 **2. Beyond the Prima Facie Case: Burden-Shifting**

14 The Ninth Circuit applies the *McDonnell Douglas* burden-
15 shifting framework to disability discrimination claims under the
16 ADA. *Weaving v. City of Hillsboro*, No. 10-CV-1432-HZ, 2012 WL
17 526425, at *4 (D. Or. Feb. 16, 2012). Under that framework, once
18 the employee establishes a prima facie case of disability
19 discrimination, the burden shifts to the employer to provide some
20 legitimate, nondiscriminatory reason for its allegedly
21 discriminatory actions. *Shepard*, 829 F. Supp. 2d at 963. If the
22 employer does so, the burden shifts back to the employee to
23 demonstrate that the reason was pretext for discrimination.
24 *Weaving*, 2012 WL 526425, at *4.

25 Because Plaintiff has established a prima facie case of
26 disability discrimination, Defendant must proffer a legitimate,
27 nondiscriminatory explanation for terminating his employment,
28 "i.e., one that 'disclaims any reliance on the employee's

1 disability in having taken the employment action.'" *Curry County*,
2 451 F.3d at 1084 (quoting *Snead*, 237 F.3d at 1093). Defendant's
3 safety review team determined that Plaintiff's improper rest and
4 improper recognition of illness was the root cause of the accident,
5 making it "preventable" and in violation of DOT regulations. The
6 safety review team emphasizes that they were "aware that
7 Plaintiff's cold was so bad that, even after twice taking over-the-
8 counter medication, he coughed so hard that he passed out and lost
9 control of his truck." (Def.'s Mem. Supp. at 27.)

10 The evidence in the record that raises a material issue of
11 fact that Defendant's proffered non-discriminatory reason is a
12 pretext includes the evidence referred to above at page forty-one,
13 lines ten through nineteen. The evidence of discrimination can
14 also serve to rebut the legitimate non-discriminatory reason for
15 termination offered by Defendant. Who the jury believes is a
16 classic material issue of fact here.

17 In addition, the emergency room doctor did "not believe that
18 simple coughing should cause syncope" and questioned whether
19 Plaintiff experienced a "recurrence of his dysrhythmia." (Ohman
20 Back Decl. Ex. B at 22.) The evidence in the record suggests this
21 information was available to Defendant at the time of termination.

22 Absent a "few exceptions, conduct resulting from a disability
23 is considered to be part of the disability, rather than a separate
24 basis for termination." *Id.* (quoting *Humphrey*, 239 F.3d at 1139-
25 40). "The link between the disability and termination is
26 particularly strong where it is the employer's failure to
27 reasonably accommodate a known disability that leads to discharge
28

1 for performance inadequacies resulting from that disability."
2 *Humphrey*, 239 F.3d at 1140.

3 The Ninth Circuit has, for example, "found that there was a
4 sufficient causal connection between the employee's disability and
5 termination where the employee was discharged for excessive
6 absenteeism caused by migraine-related absences." *Id.* (citing
7 *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 875 (9th Cir. 1989)).
8 Similarly, the Ninth Circuit has found that there was a sufficient
9 causal connection between the employee's disability and termination
10 where the employee was discharged for absenteeism and tardiness
11 caused by obsessive compulsive disorder. *See id.* (holding that "a
12 jury could reasonably find the requisite causal link between a
13 disability of OCD and [the employee]'s absenteeism and conclude
14 that [the employer] fired [the employee] because of her
15 disability.")

16 Along similar lines, the employer in *Curry County* appeared to
17 argue that the employee's "misconduct, if not resulting from his
18 disability, stemmed from his failure to take proper precautions in
19 light of his [epilepsy]." *Curry County*, 451 F.3d at 1084 n.4. The
20 Ninth Circuit was not persuaded by such an argument: "[A]n employer
21 could just as easily say that excessive absenteeism was caused by
22 an employee's failure to arrive at work regardless of his migraine
23 headaches, or regardless of his obsessive compulsive disorder.
24 Thus, we think that the case law does not sustain this
25 distinction." *Id.* (internal citations omitted).

26 If the finder of fact determines Plaintiff's accident resulted
27 from his disability, as the emergency room doctor's report
28 suggests, Defendant's explanation would, as a matter of law, fail

1 to qualify as a legitimate, nondiscriminatory explanation for
2 Plaintiff's discharge. See *Curry*, 451 F.3d at 1084. Accordingly,
3 the Court denies Defendant's motion for summary judgment on
4 Plaintiff's disability discrimination claim.

5 **3. Interactive Process**

6 Ninth Circuit case law makes clear that employers bear "an
7 affirmative obligation to engage in an interactive process in order
8 to identify, if possible, a reasonable accommodation that would
9 permit [an employee] to retain his employment." *Id.* at 1088. "The
10 interactive process requires communication and good-faith
11 exploration of possible accommodations between employers and
12 individual employees, and neither side can delay or obstruct the
13 process." *Humphrey*, 239 F.3d at 1137. When an employer fails to
14 "engage in any such process, summary judgment is available only if
15 a reasonable finder of fact must conclude that there would in any
16 event have been no reasonable accommodation available.'" *Curry*
17 *County*, 451 F.3d at 1088 (citation omitted).

18 Defendant does appear to claim that it engaged in any
19 interactive process, good faith or otherwise. Under these
20 circumstances, and in light of the rulings described above, summary
21 judgment would be inappropriate since a reasonable jury could
22 conclude the interactive process should have been used and could
23 also conclude that process would have found a reasonable
24 accommodation was available.¹⁰

25
26 ¹⁰ Plaintiff erroneously brought an independent cause of action
27 for failure to engage in interactive process. In *Kramer v. Tosco*
28 *Corp.*, 233 F. App'x 593 (9th Cir. 2007), the employee appealed an
unfavorable jury verdict in his action alleging disability
discrimination under the ADA and Oregon law. *Id.* at 595. In

1 **C. Workers' Compensation Discrimination**

2 Defendant moves for summary judgment on Plaintiff's claim for
 3 workers' compensation discrimination on the grounds that: (1)
 4 Plaintiff did not invoke the workers' compensation system, which in
 5 turn defeats Plaintiff's ability to show a causal link between his
 6 use of the system and an adverse employment action; and (2)
 7 Plaintiff cannot establish that Defendant's reason for terminating
 8 his employment was pretext for discrimination.

9 Under ORS 659A.040, "[i]t is an unlawful employment practice
 10 for an employer to discriminate against a worker with respect to
 11 hire or tenure or any term or condition of employment because the
 12 worker has . . . invoked or utilized the procedures provided for in
 13 ORS chapter 656." OR. REV. STAT. § 659A.040. "To establish a prima
 14 facie case of injured worker discrimination, a plaintiff must show
 15 that (1) he invoked the workers' compensation system; (2) he was
 16 discriminated against in the tenure, terms or conditions of his
 17 employment; and (3) the discrimination was caused by the employee's
 18 invocation of workers' compensation." *Shepard*, 829 F. Supp. 2d at
 19 962. The *McDonnell Douglas* burden-shifting framework applies if
 20 the plaintiff establishes a prima facie case of workers'
 21 compensation discrimination. *Id.* (citing *Snead*, 237 F.3d at 1092-
 22 93).

23
 24
 25 rejecting one of the employee's assignments of error, the Ninth
 26 Circuit stated: "[Plaintiff]'s proposed instruction would have
 27 misled the jury into erroneously believing that there existed an
 28 independent cause of action for failing to engage in the
 interactive process. [Plaintiff's employer] is not liable because,
 as the jury found, [he] was not a qualified individual, with or
 without reasonable accommodation." *Id.* at 596.

1 Defendant's first argument—which challenges the first and
2 third elements of Plaintiff's prima facie case—is easily resolved.
3 Under Oregon law, a claimant is not required to provide a formal
4 written notice of an injury or disease; rather, the workers'
5 compensation system can be invoked by "a worker's reporting of an
6 on-the-job injury or a perception by the employer that the worker
7 has been injured on the job or will report an injury." *Herbert v.*
8 *Altimeter, Inc.*, 230 Or. App. 715, 726 (2009). When viewed in the
9 light most favorable to Plaintiff, the record suggests that his
10 December 30, 2011 telephone call to Defendant's safety department
11 satisfies the *Herbert* standard.

12 Plaintiff's phone call December 30th and the report Defendant
13 received from its investigator LaLande shows Defendant knew (1)
14 there had been a serious accident, (2) Plaintiff had ridden in an
15 ambulance to the hospital for which there would be a "medical
16 bill," (3) Plaintiff had been examined at the hospital and had some
17 injury due to the seatbelt, again with an anticipated medical bill
18 from the emergency room visit, and (4) Plaintiff would be off work
19 unable to drive until he was checked out by a cardiologist
20 suggesting possible time loss.

21 To extent Defendant suggests that a compensable injury is a
22 prerequisite to invoking the workers' compensation system, the
23 Court is not persuaded by the argument. As a general matter, the
24 Oregon Workers' Compensation Board "routinely addresses questions
25 regarding the compensability of workplace injuries," *Panpat v.*
26 *Owens-Brockway Glass Container, Inc.*, 334 Or. 342, 347 (2002), and
27 in some instances, courts must address whether a workers'
28 compensation case requires the invocation of the doctrine of

1 "primary jurisdiction," see *id.* The doctrine of "primary
2 jurisdiction" provides that, "where the law vests in an
3 administrative agency the power to decide a controversy or treat an
4 issue, the courts will refrain from entertaining the case until the
5 agency has fulfilled its statutory obligation." *Boise Cascade*
6 *Corp. v. Bd. of Forestry*, 325 Or. 185, 191 n.8 (1997). Neither
7 parties' briefing adequately discuss these matters.

8 Moreover, the Oregon Court of Appeals' decision in *Parker v.*
9 *Fred Meyer, Inc.*, 152 Or. App. 652 (1998), suggests that ORS
10 659A.040 would not condition an employer's liability for workers'
11 compensation discrimination on a prior determination of
12 compensability. In *Parker*, the employee appealed the grant of his
13 employer's motion for summary judgment on workers' compensation
14 retaliation and disability discrimination claims, arguing that the
15 trial court erroneously gave issue preclusive effect to statements
16 made by an administrative law judge ("ALJ") in the course of
17 evaluating whether his injury was compensable. *Id.* at 654-55. In
18 the rejecting the employer's argument, the Oregon Court of Appeals
19 stated:

20 [T]here is nothing inconsistent in an employer reasonably
21 believing that a worker has not suffered an injury and
22 also terminating the worker for having filed a workers'
23 compensation claim. In other words, an employer may be
24 motivated to fire a worker because the worker intends to
file a valid claim or because the worker intends to file
an invalid claim. Either action would violate ORS
659.410[, now renumbered as ORS 659A.109].

25 *Id.* at 1274.¹¹

26
27 ¹¹ ORS 659A.109 uses language quite similar to that of ORS
28 659A.040. See OR. REV. STAT. § 659A.109 ("It is an unlawful
employment practice for an employer to discriminate against an

1 Defendant next argues that, "[a]s with Plaintiff's disability
2 discrimination theory, he cannot establish that [Defendant]'s
3 legitimate, nondiscriminatory reason for his termination [was
4 pretext for discrimination]." (Def.'s Mem. Supp. at 34.) As
5 discussed above, the Court has concluded that there is a genuine
6 issue of fact as to whether Defendant's explanation constituted a
7 valid nondiscriminatory explanation, which obviated Plaintiff's
8 need to demonstrate that Defendant's explanation was mere pretext.
9 Absent an explanation or argument as to why that conclusion should
10 not apply with equal force here, Defendant is not entitled to
11 summary judgment on Plaintiff's claim for workers' compensation
12 discrimination. *See Mihailescu v. Marysville Nursing Home*, No. CV
13 06-1187-HU, 2007 WL 4270751, at *15 (D. Or. Dec. 3, 2007)
14 (concluding that the court's ADA analysis "applie[d] equally to the
15 worker's compensation claim.")

16 **D. After-Acquired Evidence**

17 Defendant argues that the doctrine of after-acquired evidence
18 is a complete bar to recovery and thus it is entitled to summary
19 judgment on all of Plaintiff's claims. (Def.'s Mem. Supp. at 15.)
20 Alternatively, Defendant argues that Plaintiff cannot recover
21 damages after September 7, 2012, when it discovered that Plaintiff
22 made material misrepresentations to Defendant and the DOT medical
23 examiner regarding his past medical history.

24
25
26
27 individual with respect to hire or tenure or any term or condition
28 of employment because the individual has applied for benefits or
invoked or used the procedures provided for in ORS 659A.103 to
659A.145.")

1 Defendant is not entitled to summary judgment on the basis of
2 after-acquired evidence. In *Schnidrig v. Columbia Machine, Inc.*,
3 80 F.3d 1406 (9th Cir. 1996), the employee appealed the district
4 court's grant of summary judgment on his action under the Age
5 Discrimination in Employment Act ("ADEA"). *Id.* at 1408. The
6 employer argued that, even assuming there was a genuine issue of
7 fact as to whether it discriminated on the basis of age, summary
8 judgment was still appropriate based on after-acquired evidence.
9 *Id.* at 1412. The Ninth Circuit rejected the employer's argument:

10 The Supreme Court [has] held that the use of
11 after-acquired evidence of wrongdoing by an employee that
12 would have resulted in their termination as a bar to all
13 relief for an employer's earlier act of discrimination is
14 inconsistent with the purpose of the
ADEA. . . . Therefore, although [the employer]'s
discovery of after-acquired evidence may bear upon the
specific remedy to be ordered, it does not warrant the
granting of summary judgment.

15 *Id.* (internal citations omitted); see also *Rooney v. Koch Air, LLC*,
16 410 F.3d 376, 382 (7th Cir. 2005) (seeing no distinction between
17 ADEA and ADA claims for the purposes of the after-acquired evidence
18 doctrine); *Burkhart v. Intuit, Inc.*, No. CV-07-675-TUC-CKJ, 2009 WL
19 528603, at *12 (D. Ariz. Mar. 2, 2009) (stating that "the use of
20 after-acquired evidence of wrongdoing to [completely] bar relief
21 for an employer's act of discrimination is . . . inconsistent with
22 the purpose of the ADA.")

23 Similarly, in *Seegert v. Monson Trucking, Inc.*, 717 F. Supp.
24 2d 863 (D. Minn. 2010), the employer argued that after-acquired
25 evidence of material misrepresentations on the employee's DOT
26 health history form rendered him unqualified for the commercial
27 truck driver position and thus acted as a complete bar to his
28 recovery. *Id.* at 867. The *Monson* court concluded that such an

1 argument had been rejected by the Supreme Court. *Id.* at 868
2 (citing *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358
3 (1995)). As *Monson* explained:

4 Although *McKennon* dealt with only [on-the-job
5 misconduct], each Circuit that has confronted the issue
6 has extended *McKennon's* holding to include . . . cases in
7 which the after-acquired evidence concerns an employee's
8 alleged misrepresentation in the job application
9 process While the Eighth Circuit has not
expressly ruled on this issue, Defendant provides no
authority . . . and the Court is aware of none, in
support of departing from the holdings of the other
circuits.

10 Therefore, misconduct by [the employee], which [the
11 employer] learned of post-termination, does not act as a
complete bar to his [ADA and FMLA] claims or [Minnesota
12 Human Rights Act] claim but may be used to limit [his]
remedy.

13 *Id.* at 868-69 (citations omitted). *Monson* went on to reject the
14 employer's contention that the after-acquired evidence could
15 support summary judgment in its favor on the employee's ADA claim.
16 *Id.* at 870.

17 Consistent with *Schnidrig* and *Monson*, the Court concludes that
18 the doctrine of after-acquired evidence does not operate as a
19 complete bar to recovery, nor does it entitle Defendant to summary
20 judgment on all claims.

21 Defendant is correct, however, that Plaintiff's remedy can be
22 limited under the doctrine:

23 [A]fter-acquired evidence of wrongdoing generally limits
24 an employee's remedy in three significant ways. If an
25 employer discovers that the plaintiff committed an act of
26 wrongdoing and can establish that the 'wrongdoing was of
27 such severity that the employee in fact would have been
terminated on those grounds alone if the employer had
known of it at the time of the discharge,' the employer
does not have to offer reinstatement or provide front
pay, and only has to provide backpay 'from the date of
28 the unlawful discharge to the date the new information
was discovered.'

1 *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th
 2 Cir. 1996) (citation omitted). In order to impose such
 3 limitations, an employer must: "(1) present after-acquired evidence
 4 of an employee's misconduct; and (2) prove by a preponderance of
 5 the evidence that it would have [in fact] fired the employee for
 6 that misconduct." *Wilken v. Cascadia Behavioral Healthcare, Inc.*,
 7 No. CV 06-195-ST, 2008 WL 44648, at *4 (D. Or. Jan. 2, 2008).

8 For the purposes of the pending motion, Defendant relies on
 9 Plaintiff's allegations and admissions, which includes, *inter alia*,
 10 claims that Plaintiff informed Nucci of the 2005 incident, the 2006
 11 incident and the catheter ablation procedure. This raises a
 12 material issue of fact as to whether Defendant would have in fact
 13 fired Plaintiff. See *O'Day*, 79 F.3d at 759 (recognizing the
 14 inquiry "reflects a recognition that employers often say they will
 15 discharge employees for certain misconduct while in practice they
 16 do not.") This issue should be decided by the jury. Thus,
 17 Defendant's motion on after-acquired evidence should be denied and
 18 left for trial.

19 V. CONCLUSION

20 For the reasons stated, Defendant's motion (Docket No. 32) for
 21 summary judgment is granted in part and denied in part.

22 IT IS SO ORDERED.

23 Dated this 13th day of February, 2014.

24 /s/ Dennis J. Hubel

25

DENNIS J. HUBEL
 26 United States Magistrate Judge
 27
 28